IN ARBITRATION PROCEEDINGS

PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy	)	
	)	
Between	)	
	)	
CONTRA COSTA COUNTY,	)	
	)	
Employer,	)	OPINION AND AWARD
	)	
and	)	FRANK SILVER,
	)	Arbitrator
PUBLIC EMPLOYEES UNION, LOCAL ONE,	)	
	)	
Union.	)	April 25, 2005
	)	
RE: Grievance of D.K.	)	
	)	

This dispute arises under the Memorandum of Understanding between the above-named parties. Pursuant to the terms of the MOU, this Arbitrator was selected to hear the evidence and to determine the issues.

A hearing was conducted on January 25, 2005, in Martinez, California, at which time the parties had the opportunity to examine and cross-examine witnesses and to present relevant evidence. Both counsel argued orally at the conclusion of the hearing, and the matter was submitted following receipt of the transcript on March 4, 2005.

APPEARANCES:

On behalf of the Employer:

Kelly M. Flanagan, Deputy County Counsel
Contra Costa County

On behalf of the Union:

Roland M. Katz
Supervising Business Agent/Attorney
Public Employees Union, Local #1

ISSUE

Was the termination of the Grievant, D. K., for just cause? If not, what is the appropriate remedy?

PERTINENT PROVISIONS OF THE AGREEMENT

SECTION 36 – PERSONNEL FILES

* * *

Letters of reprimand are subject to the grievance procedure but shall not be processed past Step 3 unless said letters are used in a subsequent discharge, suspension or demotion of an employee, in which case an appeal of the letters of reprimand may be considered at the same dime as the appeal of the disciplinary action. . . .

FACTS

A. Grievant's disciplinary history.

The Grievant has been employed as a detention services worker, performing custodial services for the Sheriff's Office since 1987. She has been repeatedly counseled for excessive absenteeism during her employment. Her prior discipline includes the following:

A September, 1998 Letter of Reprimand for poor attendance.

A 1999 8-month demotion for inability to follow accepted rules, practices and procedures.

A June, 2000 Notice of Proposed Action (*Skelly* notice) proposing reduction in compensation due to excessive absenteeism. (A Final Order was never implemented with regard to this proposed discipline, although the Grievant

was served with the *Skelly* notice informing the Grievant of her absenteeism.)

A January 13, 2004 *Skelly* notice proposed a 5% reduction in pay for six months for continued excessive absenteeism. Following a *Skelly* meeting with Sheriff Warren Rupf, during which the Grievant assured him that she would improve her attendance, the discipline was reduced to a three month pay reduction. The letter accompanying the Final Order, dated February 13, 2004, stated:

"Ms. K-- should not assume that the reduction in discipline reflects a moderation of the Sheriff's position regarding her excessive absenteeism. It is, rather, an extension of good faith in the sincerity of Ms. – 's promise that no further misconduct will occur. Ms. K-- is on notice, and is on record as understanding, that any recurrence of her excessive absenteeism will result in the termination of her employment."

B. <u>The March 16, 2004 Letter of Reprimand.</u>

On March 4, 2005, the Grievant's supervisor, Food Services Director Jeff Vickers issued a Cause of Action Report to the Grievant on the basis that she had "developed a pattern of poor work performance and discourteous behavior." The report detailed a February 20, 2004 written complaint by the managers of Central Identification Services (CIS) and General Criminalistics regarding the Grievant's janitorial services at the crime lab on Escobar Street. In particular, CIS manager Roy Marzioli had emailed a complaint that the Grievant had gone off on a "tirade" against one of the clerks in his section, after the clerk had asked the Grievant to vacuum an area of the building. Marzioli did not witness the incident himself, but learned of it one or more of the clerks. According to Marzioli, the clerks subsequently began documenting incidents when the Grievant took breaks during the one and a half hours that she was assigned to clean the building, reading a newspaper or "standing outside the building smoking prior to coming into the building to do her job." (Er. Ex. 1.) The staff documented eight occasions between January 28 and February 19, 2004 when the Grievant was in the building for periods ranging from 28

minutes to an hour and 20 minutes, rather than one and a half hours -- the allocated amount of time to clean the crime lab. In his complaint, Marzioli stated that the Grievant did not adequately clean the building, due in large part to the fact that she did not work the entire hour and a half that she was assigned to clean the building (Er. Ex. 1.)

None of the clerks who provided information upon which Marzioli based his complaint testified at the arbitration.[1] The Grievant denied that she was rude to the clerk who asked her to vacuum, and she testified instead that it was the clerk who was rude to her (Tr. 125). She testified that part of the work at the crime lab involved breaking down boxes that were thrown in the janitor's closet, out of view of the staff; however, this normally took 5-6 minutes (Tr. 123-4; 154). She also said that she had to clean up debris from remodeling, but this only happened on one day (Tr. 124; 152). She testified that on that day, she was running late and only used the carpet sweeper, rather than the vacuum cleaner, and that this was the day the clerk rudely asked her to vacuum (Tr. 125).

The March 4 Cause of Action Report also stated that on two occasions, January 17 and March 2, 2004, the Grievant had failed to clean adequately certain medical offices in the detention facilities. With regard to January 17, a management memo noted that one of her supervisors, Jerry Pitlik spoke to her about the complaint, but the Grievant denied that this occurred. With regard to March 2, the Grievant testified that she had been asked to clean the offices at 6:00 a.m. rather than at her usual time later in the shift, and that when her supervisor

[1] Vickers testified that after receiving the complaint from Marzioli, he went to the crime lab and spoke to each of the clerks individually, and he satisfied himself that this was a bona fide complaint about poor performance and attitude (Tr. 65). Union business agent Arlyn Erdman testified that he questioned Vickers about who he had talked with, and that Vickers said that he talked to the head clerk who said that the emailed complaint by Marzioli made it sound worse than it was. Also, according to Erdman, Vickers said he didn't think it was necessary to talk to the other clerks (Tr. 114-115).

Charlie Collins told her of a complaint that the area had not been cleaned, she told him that there were two witnesses who saw her do the cleaning (Tr. 129).

The Grievant testified that with the exception of her conversation with Charlie Collins about cleaning the medical offices on March 2, no supervisor ever asked her to give her account of the complaints regarding the crime lab or the medical offices. Vickers testified, however, that he gave the Cause of Action Report to the Grievant on March 5, and that it is his practice to give an employee the opportunity to read one of these reports and then to discuss it in detail with the employee. However, according to Vickers, the Grievant became angry and would not discuss it with him, and she refused to sign it and walked out of the meeting (Tr. 63-4). He documented this with a note on the Cause of Action Report which is in evidence (Er. Ex. 6).

The Cause of Action Report went up the chain of command, and the decision was made to issue a Letter of Reprimand for unbecoming conduct based on the conduct detailed in the report (Er. Ex. 7). A grievance was filed protesting the Reprimand, and according to business agent Erdman, there was an agreement with Human Resources to hold the grievance in abeyance pending completion of fact-finding over an unsatisfactory evaluation issued on May 14. Fact-finding was not completed prior to the Grievant's termination.

C. <u>The termination.</u>

On October 8, 2004, Sheriff Rupf issued a notice of intended termination, and following a *Skelly* hearing the Grievant was terminated effective October 30. In addition to summarizing the Grievant's disciplinary history, the termination notice alleged continued excessive absenteeism, and, in addition, failure to follow Department policies by reporting to work out of uniform. With regard to the latter allegation, Vickers testified that on some days the Grievant reported to work

in the proper uniform, but on several days she wore either a blue smock over the uniform or improper pants. The uniform shirt has Sheriff's Office patches, which are needed to identify employees on camera as they enter secure areas of the jail, and the smock covered the patches. Vickers testified that the problem with pants culminated on April 23, 2004 when the Grievant came to work in improper pants and he told her supervisor to send her home to get the proper pants. When asked what type of pants she was wearing, he testified that he "believed" they were stretch pants (Tr. 56). After Vickers directed her supervisor to send her home, the Grievant spoke to Commander George Lawrence, who told her to go to Butler Uniforms, which supplies uniforms for the Department, to buy some pants and to bring back the invoice.[2]

Regarding attendance, on September 8, 2004, Vickers issued an attendance report for the period from January 1 to June 30, 2004, during which the Grievant showed 47.98 hours of sick leave/absent without pay (AWOP) which were not approved Family Medical Leave Act (FMLA) or workers' compensation leave. This amount of absence exceeded the 32 hour "baseline level of absenteeism" for a six month period as set forth the Sheriff's Office absenteeism policy.

The parties stipulated that for the period after the February 13, 2004 three-month reduction of pay for excessive absenteeism until the issuance of the September 9 attendance report, the Grievant was absent for a total of 46.5 hours.[3] This February 13 - September 9 time period covered seven months, although she was on vacation for approximately one month – July

[2] Under the MOU, the Sheriff's Office provides detention services workers five uniforms – pants and shirts – per year. The Grievant testified that she had been on medical leave the previous year when the Department purchased uniforms, and that when she came back to work, Charlie Collins told her to buy some dark blue pants, which she purchased at Mervyn's. She testified that she was wearing those pants on April 23 – not stretch pants – and that Commander Lawrence told her to go to Butler Uniforms to buy pants, and to bring back the invoice (Tr. 118-119.)

[3] This total includes 3.75 hours on April 6 which the Department designated as AWOP. She missed her entire eight hour shift that day due to a workers' compensation deposition, but for reasons to be discussed, 3.75 hours were considered to be unapproved.

6 through August 3. Her absences during the period were as follows:

1. On February 14, she left 3.75 hours early due to a bloody nose. She testified that she could not get it to stop and that a nurse, Lois, told her to go home and lay down (Tr. 130).

2. On February 20, she left 1.5 hours early after her husband called to tell her that her cousin had died. The cousin had had brain cancer, and the Grievant had helped to care for her in Pollack Pines on her days off. After the Grievant left work, she and her husband drove to Pollack Pines.

3. On March 4, the Grievant left work 6.5 hours early due to chest pains. She went to County Hospital where an EKG was administered, and on the recommendation of the medical staff she went home to rest. Union Exhibit 2 is a visit verification form.

4. On April 1, she left work 2.5 hours early. She testified that she felt awful and vomited.

5. On April 6, she was absent the entire shift due to a worker's compensation deposition, scheduled for 10:00 a.m. at her lawyer's office in Antioch. She testified that she gave Charlie Collins a copy of the deposition notice three or four days earlier, and she called in on the day of the deposition to remind them of the deposition (Tr. 138, 140). Her shift started at 5:00 a.m., but she testified that neither Collins nor anyone else in the chain of command told her she should come in to work before the deposition. She testified further that her attorney told her she should come to his office at about 8:00 a.m. for the 10:00 o'clock deposition, and that if she had come to work, she would have had to take a shower before leaving, and would only have been there for an hour and a half (Tr. 140-141). The deposition ended at approximately 12:45. On this day, the County designated 3.75 hours of her shift to be AWOP.

6. On April 28, she left two hours early due to an earache.

7. On June 26, she missed the entire shift. She testified that she and her husband received

a 3:00 a.m. phone call that her 21-year-old nephew, for whom she acted as foster parent from ages 4 to 18, had been air-lifted to U.C. Davis Medical Center after having been pushed through a plate glass window (Tr. 142-144). She called into work, and she and her husband went to the hospital. Insurance records show that the nephew was hospitalized for three days, from June 26-29, and that the level of care was "acute." (Un. Ex. 5.)

8. On June 29, the Grievant missed her entire shift because that was the day her nephew was released from the hospital (Tr. 146).

9. On August 10, she missed an entire shift due to asthma.

10. On September 8, she left 2.5 hours early because her adult daughter, who was living at home with her 2 ½ year old son, was very sick and needed to go to the hospital, and her husband could not leave his job to go home and care for their grandson (Tr. 148).

POSITIONS OF THE PARTIES

The County

The County argues that the Grievant was properly discharged based on a spectrum of issues that had arisen over many years. The weight of arbitral precedent is that excessive absenteeism, whether for medical or other legitimate reasons, provides a basis for termination when it continues for a lengthy period of time. FMLA or worker's compensation absences are not at issue; what is at issue are the sporadic, unplanned absences which are disruptive to the Department's need to assure that janitorial services are performed.

Here, the Sheriff's excessive absenteeism policy provides for active monitoring of absenteeism based upon a six month baseline amount. The Grievant was counseled repeatedly over the years for excessive absenteeism, given a letter of reprimand in September, 1998, and a *Skelly* notice in June, 2000 which was never implemented. She returned from a year-long leave of absence in October, 2003, and by January, 2004 she was already subject to a proposed reduction in pay for absenteeism. The length of the pay reduction was reduced only after she told the Sheriff she would try to improve. Very shortly afterwards, she began leaving before her shift was over. She exceeded the 32 hour baseline for the January-June period. She also exceeded the baseline for February - October, especially considering her one month vacation in July.

Unavoidable absences happen for everyone, but at some point the Employer has a right to have employees come to work regularly so that the work can get done. Employees who can't report regularly to work may be terminated, regardless of the reasons for the absences (excluding FMLA and workers' compensation leave).

In addition to the absenteeism problems, the Grievant has had a number of performance issues. There were complaints from the detention facility and from the crime lab about the quality of her work. Although the Grievant seemed to testify that she worked out of sight of the crime lab employees, in the janitor's closet, she also testified that the longest it took to break down boxes was six minutes and that there was only one day where there was remodeling debris. Employees documented periods of 45 minutes to an hour when she was not working. Vickers investigated the complaints, satisfied himself that there were genuine problems of performance and attitude. In addition there were problems with working out of uniform, and for some reason

Employer's position

the Grievant was unable to follow Department rules and procedures. She had previously demoted for 8 months in 1999 for failure to follow rules and procedures.

The Grievant was on clear notice in February, 2004 that she could be terminated for continued excessive absenteeism, and her absenteeism in itself constituted just cause for termination. In

addition, her performance issues and rule violations support that action. There is no reason to believe that her attendance or performance will improve, and for that reason the County argues that termination should be upheld.

The Union

The Union argues that the key to this case involves the absences from February 14 forward, and that those absences don't provide cause to terminate. Addressing first, however, the reprimand for work performance issues, the Employer failed to meet its burden by attempting to make its case entirely by hearsay. Vickers acknowledged that he had wanted to fire the Grievant in January, when the Sheriff proposed a six month pay reduction. His testimony regarding the reprimand and the uniforms demonstrate that this is an individual whose vision was colored by his desire to terminate this employee. The County did not rebut Erdman's testimony that Vickers told him he only interviewed one clerk at the crime lab who said that the Grievant's conduct wasn't as bad as Marzioli's email made it seem. There was no testimony by the persons involved with the alleged failure to clean medical offices, and Collins did not testify about his investigation, or lack thereof.

At most, if the reprimand is upheld, it merely aggravates the potential penalty for conduct

Employer's position

that followed. Regarding the uniforms, the alleged misconduct is again seen through Vickers' eyes. Independent of Vickers, the Commander authorized the Grievant to purchase new pants, and so he obviously concluded she needed new pants. In sum, the allegation about the uniforms is unsupported.

Regarding attendance, it cannot be said that an employee, even with an absenteeism problem, can never miss an hour of work due to illness or other matters outside of the employee's control. Throwing out the 16 hours on June 26 and 29 when she cared for her nephew, that brings the total to well below the Department's baseline standard of 32 hours. Even that standard – in a unilaterally

adopted policy – is not intended as a basis to fire someone, but to simply indicate a potential problem. Considering her other absences, with the exception of August 10, every time she missed work due to illness she in fact came to work and only left after performing part of her shift. That in itself shows she was making an effort to improve her attendance. After her cousin died of cancer, she missed only part of one shift, even though the MOU allows three to five days for death of a family member, including a cousin. This shows a genuine effort on her part to control absenteeism. Regarding her deposition, it was a reasonable decision on her part not to come to work for an hour and a half, before having to shower and leave for her lawyer's office. Collins didn't testify to rebut her testimony that she provided adequate notice regarding the deposition. Similarly, the situation regarding the need to come home to care for her daughter's child was beyond her control.

For these reasons, the Union argues that the Grievant should be reinstated and made

Union's position

whole.

DISCUSSION

A. The Letter of Reprimand.

Under Section 36 of the MOU, a letter of reprimand may not be processed past Step 3 of the grievance procedure, but it may be considered if relied upon in a subsequent disciplinary action. The evidence is that the March 16 letter of reprimand was grieved and was held in abeyance until the time of the Grievant's termination. Therefore, it must be considered on the merits in this proceeding.

The County has relied entirely on hearsay evidence in support of the reprimand. CIS manager Roy Marzioli testified concerning the reasons for his emailed complaint that the Grievant had gone on a "tirade" against one of the clerks in his division, but he did not observe the incident himself and he got his information from one or more of the clerks. He also testified that crime lab employees documented the days when the Grievant cleaned the building for less than the hour and a half allocated for that assignment. None of the clerks were called as witnesses to provide direct testimony. In addition, no direct evidence was provided to support the allegations that on two occasions the Grievant failed to clean medical areas in the detention facility. Although two supervisors, Charlie Collins and Jerry Pitlik, were claimed to have spoken to the Grievant concerning the complaints, neither supervisor was called as a witness.

The Grievant essentially denied these complaints, and although some of her testimony about the details seems somewhat questionable, given the lack of direct evidence to support the reprimand, it cannot be concluded that the reprimand was warranted. Section 36 provides that letters of reprimand are subject to consideration at the same time as subsequent disciplinary

actions, and the County has failed to sustain its burden of proof in this regard. Therefore, the March 16 letter of reprimand cannot be considered in support of the termination.[4]

B. <u>The Grievant's record of absenteeism.</u>

The termination notice cited the Grievant's extensive history of counselings and disciplinary action for excessive absenteeism over much of her seventeen years of employment with the County. The fact that she had been employed for seventeen years is somewhat misleading, since at least for the period of 2000 through 2003, she was off work on approved medical and/or workers' compensation leave for most of the time. During the times when she was actively employed, her record of absenteeism was extremely poor, and after she returned from a year-long medical leave in October, 2003, it took only until January 13, 2004 before she was subject to a *Skelly* notice proposing a six-month, 5% reduction in pay for excessive absenteeism. Sheriff Rupf agreed to reduce that discipline to a three-month reduction in pay due to the Grievant's statement that she would improve her attendance. At the time, the Grievant was explicitly warned that any recurrence of her excessive absenteeism would result in termination. There is no question but that the Grievant was on notice that she would be terminated if she did not meet the Department's expectations of regular attendance.

The Grievant's attendance for the period from February 13, 2004 , the date of the Final

[4] The termination notice also cited incidents when the Grievant was allegedly out of uniform, culminating in an incident on April 23, 2004, when Food Service manager Jeff Vickers directed that the Grievant be sent home to get proper uniform pants. Mr. Vickers' previous recommendation in January to terminate the Grievant was not accepted by the Sheriff, who decided on a six-month pay reduction, later reduced to a three-month pay reduction. There appeared to be mutual hostility in the relations between Mr. Vickers and the Grievant. Mr. Vickers' account of what occurred on April 23 was vague in several respects, and the Grievant contradicted him on important points. Under these circumstances it is difficult to rely on Mr. Vickers' testimony as being entirely objective, and the County did not call as witnesses either Commander George Lawrence or supervisor Charlie Collins, both of whom were directly involved in the April 23 incident. Given the lack of support for Mr. Vickers' testimony, this allegation of the termination notice was not sustained.

Order of the three-month pay reduction, and the October 8, 2004 notice of intent to terminate must be evaluated in the context of her consistent record of counseling and discipline for excessive absenteeism over the entire period of her employment with the County and the Sheriff's explicit warning that continued excessive absenteeism would result in termination. The question to be considered is what is the appropriate standard by which to measure her absenteeism during the critical eight month period. The Sheriff's Office Excessive Absenteeism Policy sets a baseline level of absenteeism at 32 hours for a six month period. The Union argues that this unilaterally adopted baseline does not establish a basis for terminating an employee, but merely identifies a level of absenteeism that is subject to review. This argument, however, ignores the Grievant's situation. She had reached the final step in progressive discipline for absenteeism, and was on notice that continued excessive absenteeism would result in termination. She also was on notice of the baseline standard in the absenteeism policy, and it stood to reason, under these circumstances, that exceeding the baseline could subject her to termination. The absenteeism policy provides that "contributing factors and extenuating circumstances will be considered in each case," and it is therefore appropriate to consider extenuating circumstances with respect to the Grievant's absenteeism. Nevertheless, in the situation in which the Grievant found herself after February 13, 2004, exceeding the baseline without adequate extenuating circumstances could appropriately provide grounds for termination.

Between February 13 and September 9 (seven months), the Grievant was absent for a total of 46.5 hours.[5] She was on vacation for a month during that time period, from July 6

[5] The County has treated as excused absence 4.25 hours on April 6, when her workers' compensation deposition was taken, and those hours are not included in the 46.5 hour total. The 3.75 hours which the County treated as AWOP are included in the total.

through August 3. Extending the time period to October 8, the date of the *Skelly* notice, this was an eight month time period, including one month of vacation. Effectively, therefore, she worked for seven months after February 13, which correlates to a baseline figure of 37.33 hours.

Illness which does not qualify for workers compensation or FMLA leave is not an extenuating circumstance under the policy. It is not claimed that the Grievant was entitled to either type of approved leave during 2004.[6] It is recognized under arbitral precedent that excessive absenteeism can be the basis for termination, even if the absence is due to legitimate illness. The basic reason that arbitrators have upheld employers' right to terminate employees for excessive absenteeism is that employers must be able to count on employees reporting to work on a regular basis in order to assure that the necessary work can get done. Absenteeism is especially disruptive where, as in this case, the absences are sporadic and unpredictable, rather than for periods of consecutive days, since an employer cannot easily find replacements for a worker who is absent for a day, or part of a day. Therefore, the Grievant's absences due to illness for all or part of a shift on February 14, March 4, April 1, April 28, and August 10, totaling 22.75 hours cannot be considered subject to extenuating circumstances under the policy. Similarly, since she was not entitled to FMLA leave, the 2.5 hours of absence on September 8 to care for her daughter's child were not subject to extenuating circumstances.

Her explanation for failing to come to work for part of the shift on April 6, the day of her workers' compensation deposition, was unconvincing. She normally reported to work at 5:00 a.m., and there is no reason she could not have done so on that day. The deposition did not start

[6] She had been absent on approved leave for a year from October 24, 2002 through October 9, 2003, and she presumably had not worked the 1,250 hours in 2003 required to qualify for FMLA leave in 2004 (see 29 USC §2611.)

until 10:00 a.m., and it is unlikely that her lawyer told her that she had to be at his office at 8:00 a.m. Although she testified that Charlie Collins did not instruct her to come in at 5:00 a.m., it is far from clear what conversation, if any, did take place. She testified that she gave him the notice for a 10:00 a.m. deposition, and he may very well have assumed that she would come in to work the first half of her shift. Such an assumption would not have been unreasonable. The Department reasonably designated 3.75 hours of her April 6 shift as AWOP.

The Union argues that the fact that the Grievant missed only 1.5 hours of her shift after her cousin died shows that she was making serious efforts to improve her attendance. However, the Grievant had been caring for her cousin, who was suffering from brain cancer, on her days off, and the cousin's death was presumably not unexpected. It is not clear why she could not have completed her shift before leaving for Pollack Pines. She was on notice that she could not miss work, and she could reasonably be expected to place more importance on fulfilling her obligation to her job.

The Union argues that the two shifts that the Grievant missed on June 26 and 29 should be considered excused. While it may be accepted that her absence on June 26, after receiving a middle-of-the-night call that her nephew/foster son was being airlifted to U.C. Davis Medical Center following an accident, was at least in part subject to extenuating circumstances, the record does not show justification for her to miss a shift on June 29. The insurance records establish only that the nephew was hospitalized for three days, and it was not shown that the injury was extremely serious. There is no evidence showing why it was necessary for her to miss work on the day he was dismissed from the hospital. Again, it is not claimed that she was entitled to FMLA leave.

In summary, the evidence does not show that the Grievant recognized her obligation to reliably come to work and to remain her entire shift after she assured the Sheriff in February that she would improve her attendance and after she was warned that further excessive absenteeism would subject her to termination. In general, her absences were not subject to extenuating circumstances, and even if she is given the benefit of the doubt with regard to June 26, she still exceeded the Department baseline for her seven months of work. After having been counseled and disciplined numerous times during her employment for excessive absenteeism, at some point the Sheriff's Office was not required to continue her employment. She was on explicit notice after February 13, 2004 that she would be terminated for continued excessive absenteeism, and yet she failed to bring her attendance up to the Department's standard. For these reasons, the Department was justified in terminating her for excessive absenteeism.

AWARD

The termination of the Grievant was for just cause. The grievance is denied.

Dated: April 25, 2005

Frank Silver, Arbitrator